Supreme Court, U. S.
FILED
JUL 24 1980
MICHAEL RODAK, JR., CLERK

No. 80-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALMEDA MALL, INC, NORTHWEST MALL, INC. AND WESTWOOD MALL, INC.,

Petitioners,

v.

HOUSTON LIGHTING & POWER COMPANY,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM R. BROWN
WALTER E. WORKMAN
DAVID P. COTELLESSE
C. HENRY KOLLENBERG
One Shell Plaza
Houston, Texas 77002
(713) 229-1234

Of Counsel:
BAKER & BOTTS
One Shell Plaza
Houston, Texas 77002

Bowne of Houston, Inc. Printed in U.S.A.

TABLE OF CONTENTS

	Page
QUESTIONS RESTATED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	2
A. The Decision of the Court of Appeals is in Full Accord with *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*	2
B. The Decision of the Court of Appeals Does Not Conflict with *Otter Tail Power Co.* v. *United States*	3
C. The Decision of the Court of Appeals Does Not Conflict with *United States* v. *Grinnell Corp.*	5
CONCLUSION	5

TABLE OF AUTHORITIES

Cases

	Page
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	2, 4
United States v. Grinnell Corp., 384 U.S. 563 (1961)	2, 3, 4
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	1, 2, 3, 4

Statutes

15 U.S.C. § 2	4
15 U.S.C. § 15	1, 2, 3, 4

No. 80-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALMEDA MALL, INC, NORTHWEST MALL, INC. AND WESTWOOD MALL, INC.,

Petitioners,

v.

HOUSTON LIGHTING & POWER COMPANY,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS RESTATED

1. Whether the petition should be granted to review the court of appeals' holding that private antitrust plaintiffs must prove antitrust injury to recover treble damages under Section 4 of the Clayton Act.

2. Whether the petition should be granted to review the claim of conflict with this Court's opinion in *Otter Tail Power Co.* v. *United States,* when the courts below concluded that Petitioners failed to prove actual or potential competitive impact.

3. Whether the petition should be granted to review the claim that the court of appeals' holding that Petitioners failed to prove antitrust injury conflicts with this Court's opinion in *United States* v. *Grinnell Corp.*

STATEMENT OF THE CASE

The opinions of the courts below contain accurate statements of the facts and the evidence (or lack of evidence) in this case. A comparison between the opinions below and the petition will reveal serious inaccuracies in the petition. Therefore, Respondent relies upon the opinions below for its statement of the case.

SUMMARY OF REASONS FOR DENYING THE PETITION

The opinion and judgment of the court of appeals in this cause are correct and do not conflict with the decisions of any other court of appeals or with any applicable decisions of this Court. Accordingly, the petition should be denied.

ARGUMENT

A. The Decision of the Court of Appeals Is in Full Accord With *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*

The basis for decision in the district court and an alternative independent basis for decision in the court of appeals was that petitioners failed to prove antitrust injury, as required by Section 4 of the Clayton Act, 15 U.S.C. §15. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477 (1977). Since this independent ground for decision is based upon the remedial provisions of Section 4 of the Clayton Act, and not upon the substantive requirements of the Sherman Act, there is no conflict with this Court's opinions in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973),

or *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1961), or any other applicable decision of this Court, and the petition should be denied.

B. The Decision of the Court of Appeals Does Not Conflict With *Otter Tail Power Co.* v. *United States.*

Otter Tail Power Co. v. *United States* was a government case and did not involve the requirement imposed upon private plaintiffs to prove antitrust injury under Section 4 of the Clayton Act. Therefore, the decisions below that Petitioners failed to meet their burden of proof under Section 4 of the Clayton Act do not conflict with *Otter Tail.*

The factual distinctions between this case and *Otter Tail* drawn by the court of appeals are fully substantiated by the quotations from *Otter Tail* appearing in the petition at pages 11-13. As the opinions below demonstrate, in contrast to the situation of Otter Tail Power Company, Respondent is the franchised retail distribution company in the City of Houston. Respondent is a fully integrated utility and generates its own electricity, but unlike Otter Tail, which was seeking to prevent the establishment of competing retail distribution companies in several municipalities within its service area in which it had lost its franchise, Respondent has not refused to sell or transfer power to other retail utilities within its service area. The courts below concluded that Petitioners' attempt to compare their private property to municipal retail electric distribution systems was unsupported by the evidence. The court of appeals has not misread *Otter Tail,* and its holding does not conflict with the legal principles underlying this Court's decision in that case.

Equally significant, the court of appeals and the district court both correctly concluded that Petitioners produced no evidence of real competition for retail customers, no evidence of the so-called "efficiencies and innovations" referred

to repeatedly in the petition, and no evidence of material competition between Petitioners and any other regional malls. For all of these reasons, the decision of the court of appeals does not conflict with *Otter Tail,* or any other applicable decision of this Court.

C. The Decision of the Court of Appeals Does Not Conflict with *United States* v. *Grinnell Corp.*

The holding of the court of appeals that Petitioners failed to prove antitrust injury does not graft a third element onto the well-recognized elements of proof of the offense of monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2. The court of appeals, citing *United States* v. *Grinnell Corp.,* 384 U.S. 563 (1961), sets out the accepted elements of proof of monopolization under Section 2 and relies upon them in its analysis. Petition at 14a. Whether or not Petitioners could prove a violation of Section 2, as private plaintiffs they must also prove antitrust injury, as required by *Brunswick.* This requirement in no way conflicts with *Grinnell. Brunswick,* which construes Section 4 of the Clayton Act, does not involve the substantive standards of Section 2 of the Sherman Act, and neither of the decisions below cites *Brunswick* for the proposition that antitrust injury is an element of monopolization. Accordingly, the petition should be denied.

CONCLUSION

This case was correctly decided by both the district court and the court of appeals. The questions presented by the petition, taken individually or as a whole, provide no reason for this Court to exercise its powers of review, and the petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM R. BROWN
WALTER E. WORKMAN
DAVID P. COTELLESSE
HENRY KOLLENBERG
One Shell Plaza
Houston, Texas 77002
Attorneys for Houston Lighting & Power Company

Of Counsel:
BAKER & BOTTS
One Shell Plaza
Houston, Texas 77002

CERTIFICATE OF SERVICE

This is to certify the service of the foregoing was made on July 21, 1980, by depositing three copies of same in the United States mails, First Class Postage Prepaid, addressed to: Lewis A. Noonberg, Piper & Marbury, 1100 Charles Center South, 36 South Charles Street, Baltimore, Maryland 21201.

.....

William R. Brown